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IN THE

Supreme Court of the United States

October Term 1978

No. 78-1815

CECIL D. ANDRUS, Secretary of the Interior,
Petitioner,

v.

SHELL OIL COMPANY and D. A. SHALE, INC.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Shell Oil Company and D. A. Shale, Inc., respectfully request that this Court deny the Petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit. The decision of the Court of Appeals is clearly correct and consistent with the decisions of this Court, and moreover, it reflects special circumstances so that the ruling has little likelihood of general applicability. If, however, this Court is disposed to grant the Petition, review should not be confined to the single question tendered by the Petition, which will not be dispositive of this long-pending litigation, but should include review of the four separate grounds on which the District Court awarded summary judgment.

QUESTIONS PRESENTED

At issue in this litigation, commenced by the Department of the Interior in 1964, is whether the remarkably uniform oil shale deposits of the Green River Formation, principally in Colorado, constitute valuable mineral lands within the meaning of the Mining Law, 30 U.S.C. 22. As exemplified in the opinion of the District Court,[1] this issue has four aspects:

1. Whether as a matter of statutory construction Green River Formation oil shale deposits constituted valuable mineral lands as of the time of the location of the claims in suit (1917-1918) and as of the time of applications for patent for the claims (1958-1960).

2. Whether by virtue of having formulated in 1916, promulgated in 1920, and thereafter consistently applied until 1961 an administrative rule and practice that Green River Formation oil shale deposits constituted valuable mineral lands entitled to patent (but only if the other conditions for patent were met), under which 2,326 oil shale claims have been patented, the Department of the Interior may rescind that rule with retroactive effect so as to deny patent on the six claims in suit, the government having conceded that the claims in suit differ in no material way as to size and richness of the oil shale deposits from many claims heretofore patented.

3. Whether the Department of the Interior, having induced the expenditure of large sums in the development of commercial technologies for the production of oil from shale and in the initiation, purchase and

[1] The opinions below, set forth in the Appendices to the Petition for Certiorari, are cited herein by reference to those Appendix pages; the District Court's opinion appears at pp. 22a-59a.

development of oil shale mining claims by reiterated statements that the claims could be taken to patent and developed commercially, is now estopped to assert that the oil shale claims in suit have never been eligible for patent.

4. Whether Congress, in its enactment of the Mineral Leasing Act of 1920 with a savings clause as to previously located valid oil shale claims, in its extensive favorable review in 1930-31 of the Department's administration of the Mining Laws with respect to oil shale, and in its adoption in 1956 of legislation expressly designed to facilitate the patenting of oil shale claims, has confirmed the long-standing Department rule and practice so as to deprive the Department of the power by mere administrative fiat to overturn that rule and practice. This issue alone is tendered by the Petition, and in its statement of this single issue the Petition confines discussion almost entirely to the circumstances and effect of the 1930-31 Congressional review.

SUPPLEMENTAL STATEMENT

Because the Statement in the Petition addresses only the Congressional ratification issue, and that only in part, a supplemental statement is necessary to permit full evaluation of the relevant four issues stated above.

1. The six unpatented oil shale placer mining claims involved in this case were located in Garfield County, Colorado, in 1917 and 1918. The claims were then known to contain very substantial oil shale deposits of the Green River Formation capable of yielding large quantities of oil and oil by-products. The location of the claims occurred at a time when demand

for oil was rising rapidly and supply was decreasing. In reflection of these trends, which were expected to continue, the price of oil in the United States was rising rapidly, from an average of 64 cents per barrel in 1915 to more than $3.00 in 1920. The technology required to produce oil from oil shale had been demonstrated in a number of foreign countries, most prominently by a profitable oil shale industry in Scotland, where compared with the Green River Formation oil shale of Colorado the oil shale deposits were thinner and yielded less oil per ton of rock and were more difficult to mine. (*E.g.*, 4a-5a, 8a; 43a, 46a; 63a; 129a-135a; 160a-164a.) As shown in an economic study prepared by the Department of the Interior for the hearings below, an oil shale mine and refinery in the area of Respondents' mining claims would have operated with a small profit in the years 1915-1919[2], a conclusion which confirmed contemporary estimates.

2. These developments were accompanied by action by the Department of the Interior which showed from the outset the Department's appreciation of the value of the Green River Formation oil shale lands. As the District Court noted below (34a-46a), private expenditures in oil shale claim location and development in the pre-1920 period were very largely directly induced by the Department. On the basis of studies beginning in 1913 by the United States Geological Survey, the Wilson Administration in 1916 formally classfied large areas of the Green River Formation, including the area within the claims in suit, as valu-

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[2] (14a-15a; 97a-99a.) A similar study focused on 1966 showed a larger profit, and private and governmental studies in 1951 also showed profits. (*Ibid.*)

able mineral lands. The purpose of this classification was to prevent alienation of the oil shale deposits under the homestead laws, but at the same time the Administration decided to leave them open "to acquisition under the mineral land laws", by location and discovery which was known already to be underway. The Green River Formation lands were left available for appropriation under the mining laws precisely to serve as an inducement to private parties to develop an industry.[3] The Administration also invited Congress to include oil shale in the Mineral Leasing Act. *Hearings on H.R. 406 before the Senate Committee on Public Land*, 64th Cong., 1st Sess., pp. 301, 320-321 (1916).

Also in 1916, in further reflection of the acknowledged value of the Green River Formation oil shale deposits, Naval Oil Shale Reserves were established by Executive Order to assure the Navy a fuel supply. Aware that areas within the boundaries of the proposed Reserves were already the subject of oil shale mining claims, the Administration included within the Reserves a larger area than would otherwise have been set aside for the Navy. Because of concern that the withdrawal for the Naval Oil Shale Reserves was having a chilling effect upon private efforts to develop an industry, the Administration was careful to reassure the public that no further Executive Branch withdrawals were contemplated. (*See* 4a-4b; 32a;

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[3] The classification document explained "The lands have not been recommended for withdrawal because the oil shale industry is not yet developed in the United States, and as it is desired to give opportunity for the establishment of experimental plants it is believed the lands should remain open for the present to acquisition under the mineral-land laws . . . ." Exhibit G-31. The classification remains in effect. *Cf.* 12a-13a.

Hearings before the House Committee on Public Lands, "Oil Leasing Lands", 65th Cong., 2d Sess. (*"1918 Hearings"*) pp. 811-832, 904-913 (1918).

Oil shale researches and economic studies through the Bureau of Mines of the Department of the Interior led to conclusions that were highly publicized in the hope of stimulating development, that the time had already arrived when Green River Formation oil shales could be profitably developed. *See, e.g.*, 39a-47a. For example, in the 1917 Report of Secretary of the Interior Lane, it was stated (p. 73) that "It is believed that it is now commercially feasible to work selected deposits in competition with oil from oil wells."[4]

During the years 1916-1920, the Department of the Interior responded favorably to numerous inquiries from the Congress and members of the public whether oil shale mining claims would be patentable. (*See, e.g.*, 5a, 34a.) As a consequence, the years 1916-1920 witnessed much activity by private parties locating oil shale claims and expending efforts and funds to develop a commercial industry. As the Hearing Examiner's decision noted, "The evidence in this respect is massive." (145a.)

3. It was against this background that during the latter half of the decade before 1920 the Congress took up consideration of legislation to supplant claim

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[4] A number of Interior witnesses testified at the hearing as to a substantial body of official government statements prior to 1920 encouraging an interest in oil shale and clearly expected to induce such interest. As the Court of Appeals concluded, "The Department of the Interior by its publications and policies, strongly encouraged the location of claims on oil shale deposits in the pre-1920 period." (4a.)

appropriation of oil shale lands under the Mining Law with a scheme for government leasing. As early as 1916, senior officials of the Department of the Interior invited the Congress to consider including within the Mineral Leasing Bill then being debated the Green River Formation oil shale deposits classified as mineral land. (*E.g.*, 31a-32a.) At hearings in 1918, the Congress heard extensive testimony about the oil-yielding potential and development prospects of the Green River Formation and about the initiation and development of mining claims. Congress was further apprised of the preliminary views of the Department of the Interior that patents could be obtained for such mining claims under the Mining Law (*1918 Hearings, supra.*) In order to allay concerns expressed to Congress that the leasing bill might prejudice oil shale claims already located, the leasing bill as enacted contained a specific clause, drafted with the involvement of oil shale mining claims owners and high Interior Department officials, excepting from its operation prior valid mining claims. This clause became the "savings clause" of the Mineral Leasing Act that was enacted on February 25, 1920.[5]

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[5] Congress' intention that the savings clause applied to prior oil shale claims regarded as valid is thoroughly documented. *See, e.g.*, 5a, 32a-36a; *1918 Hearings, supra; Hearings before the House Committee on Mines and Mining on H.J. Res. 150, "Joint Resolution To Suspend the Requirements of Annual Assessment Work on Mining Claims During the Year 1919"*, 66th Cong., 1st Sess., pp. 16-18 (1919); *Consolidated Hearings before the House Committee on Public Lands, "Applications for Patent on Oil-Shale Lands"*, 71st Cong. 2d and 3rd Sessions (*"1930-1931 House Hearings"*), pp. 36-37, 99, 121-123, 170, 181 (1930-1931); *Hearings before a Subcommittee of the Senate Committee on Public Lands and Surveys Pursuant to S. Res. 241, "Administration and Use of Public Lands"*, 78th Cong., 1st Sess., pp. 3783-84, 3798-99, 3804-05 (Part 13, Nov. 15 & 16, 1943).

4. The preliminary favorable views of the Department as to the patentability of oil shale claims were formalized in published "*Instructions, Act of February 25, 1920—Oil Shale Placer Claims*", 47 L.D. 548 (May 10, 1920), when the first application for patent for oil shale mining claims reached the Department shortly after passage of the Leasing Act. Inasmuch as the ruling would be a precedent in other cases, and formal determination of the patentability of oil shale claims located prior to the effective date of the Mineral Leasing Act would diminish the scope of leasing, the application provoked a plenary review at the Secretarial echelon in the Department. The conclusion expressed in the "*Instructions*", that oil shale lands were "subject to valid location and appropriate under the placer mining laws" reflected a conclusion favorable to the patentability of the 14 claims before the Department, and in consequence of the decision the first patent for Green River Formation oil shale claims was issued.[6] Save as patenting was suspended during the investigations conducted by both House of Congress in 1930-1931, pending the outcome of legislative review of Department practice, recognition of the value of the oil shale deposits by the Department was reflected continuously over the succeeding 40 years, during which the Department of the Interior issued patents to 2,326 oil shale claims in the Green River Formation. (*E.g.*, 8a-11a, 34a-36a, 167a-170a.)

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[6] The 14 claims in question, the La Paz group, lie in a very similar position to the six claims in suit. An expert geologic witness for the Department at the hearing below conceded that the oil shale strata in the claims at suit were essentially lateral extensions of the strata contained in the La Paz claims. Transcript of hearing, pp. 508-509.

5. The Department's recognition of oil shale deposits as "valuable mineral lands" was challenged in *Freeman* v. *Summers* contest proceedings during the period 1923-1927 between homestead and mining claimants. The argument against the validity of the mining claims was pressed in part upon the basis that recent discoveries of conventional petroleum had temporarily depressed petroleum prices and deferred the day when commercial production of oil from shale could be expected. The Secretary of the Interior personally presided at a rulemaking hearing in the course of the proceedings, at which officials of the Department of the Interior, members of Congress, and representatives of oil shale mining claim owners participated. The final ruling of the Secretary, adhering to the view that oil shale claims continued to be patentable, was published in the official Interior Department reports (52 L.D. 201) and also in the Annual Report (pp. 29-30) of the Secretary for 1927.[7]

6. The Department's recognition of the patentability of oil shale claims was not a product of indifference to the subject. On the contrary, throughout the 1920's and until 1935, the Department conducted a vast campaign to review all oil shale claims and to institute contest proceedings against any claim found to be subject to challenge on any ground. A principal issue in this campaign was the question of assessment work, which reached this Court twice, in *Wilbur* v. *Krushnic,* 280 U.S. 306 (1930), and in *Ickes* v. *Virginia-Colorado Development Corp.,* 295 U.S. 639 (1935).

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[7] 7a, 35a; "*Hearings on S. Res. 379 Before the Senate Committee on Public Lands and Surveys*", 71st Cong., 3rd Sess ("*1931 Senate Hearings*"), pp. 1, 2, 34, 51-52, 62-63, 83, 98, 175, 211 (1931).

Virtually all unpatented oil shale claims were declared invalid on assessment work grounds.[8]

7. At the close of the 1920's, as the Petition notes, the Department's practices with respect to patenting oil shale claims came under intensive public scrutiny as the result of a series of sensational articles authored by a disgruntled Chief of the Field Service of the Land Office in Denver, Ralph Kelley. The Department's decision in *Freeman* v. *Summers* was the focus of his attack, not because he thought that oil shale was not valuable, but because he contended that the mining laws had not otherwise been complied with. Indeed, the central thesis of his attacks was that oil shale was enormously valuable and should be conserved for the benefit of the general public. His attacks led to well-publicized investigations of the Department's practices with respect to oil shale by Assistant Attorney General Seth Richardson and by both houses of Congress. The central focus of all of these investigations was whether oil shale was being appropriately treated as a valuable mineral resource in the Department's administration of the public land laws, more particularly phrased as whether the discovery requirements of the mining laws had been satisified. At the outset of these investigations, the De-

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[8] *E.g., 1930-1931 House Hearings, supra*, pp. 6-7, 10, 27-30, 555-63, 95, 147, 155; Annual Report of the Secretary of the Interior for 1931 (p. 32). On June 16, 1939, Secretary Ickes wrote to the Chairman of the House Committee on the Public Lands, in support of H.R. 6560 which would have required performance of annual work on oil shale claims, that prior to the 1935 ruling of this Court in *Virginia-Colorado* the Department had declared more than 30,000 oil shale claims, embracing more than 4,000,000 acres, invalid for nonperformance of annual work. Ex. C-777.

partment suspended the issuance of patents for oil shale claims, and requested legislative clarification or guidance on discovery and other aspects of oil shale claims. (9a-11a; 35a-36a; *1931 Senate Hearings, supra; 1930-1931 House Hearings, supra.*)

Assistant Attorney General Seth Richardson concluded that the Government's interests in oil shale lands were being "vigorously and honestly administered by Secretary Wilbur and his Department." The Attorney General's covering letter to Secretary Wilbur for the report stated that the decision in *Freeman* v. *Summers*

> "seems eminently reasonable, but at most it was a matter of judgment on a debatable point .... there is more evidence to support the conclusion that you and your department have been exceedingly strict and exacting in resisting claims for patents than that you have been too liberal."[9]

The Senate investigation was headed by Senator Thomas Walsh, the hero of Teapot Dome. The Senate Committee reviewed extensive Interior Department files and heard testimony from the officials responsible for the issuance of oil shale patents and the decision in *Freeman* v. *Summers* and from Ralph Kelley. (*1931 Senate Hearings, supra.*)

The Senate investigation concluded with a letter from Senator Nye, the Chairman of the Senate Public Lands Committee, to the Secretary of the Interior

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[9] Exhs. C-321, pp. 165-167; C-409, pp. 7-8, in the administrative record. *Cf.* 5a: "The record shows that there was a careful examination of patent applications for compliance with the mining laws and to determine whether substantial oil reserves were present."

stating that there was no reason why the prior approach to the processing of oil shale patent applications should not be resumed. (11a.) Similarly, the House Committee investigation resulted in a Committee report recommending various changes in the mining laws with respect to oil shale mining claims, but not recommending any change with respect to the Department's practices concerning discovery or value requirements. (35a-36a.) The Department of the Interior thereafter resumed processing oil shale patent applications, rejecting claims found not in compliance with the mining laws and patenting others.

8. Toward the end of World War II it again became apparent that domestically produced supplies of conventional crude oil were becoming inadequate and that if undue dependence upon foreign imports was to be avoided, alternate energy sources such as oil shale could be developed. Responding to these developments, advocated by Secretary of the Interior Harold Ickes, Congress passed the Synthetic Fuels Act of 1944 which called for demonstration projects for the mining of oil shale and the refining of shale oil. (94a.) The patenting of oil shale claims, interrupted by the war, continued thereafter. Economic studies conducted around 1950 by the Bureau of Mines indicated that oil shale could then be profitably developed. Concurrent analyses by the National Petroleum Council, conducted at the request of the Secretary of the Interior, also showed that a profit of approximately 11% per year could then have been obtained from oil shale development. (95a-97a.)

9. Since the early 1920's, it had been the practice of the Department to refuse to issue patent to an oil shale claimant for land covered by a surface home-

stead patent unless the surface interest was first reconveyed to the United States. This circumstance had frustrated the patenting of a number of oil shale claims. With specific reference to this situation, Representative Aspinall from western Colorado introduced remedial legislation in 1956 to authorized issuance of patent for the mineral interest alone. With the support of the Department of the Interior, which advised Congress of the continuing patenting of oil shale claims, the legislation was enacted.[10]

10. Five years later, a new Secretary of the Interior and his Solicitor decided, without notice or opportunity to comment from any affected oil shale claim owner, that no further oil shale claims would be patented, and that among other objections the Department would assert that no oil shale claim had ever satisfied the value aspects of the mineral land laws. As the Court of Appeals observed,

> "No reason is given for the complete departure from the previous holdings. It is apparent that no changes in circumstances relative to oil shale and its development have come about. It is purely a change in departmental policy which came about by a change in the philosophy of the personnel." (16a; see also 14a, 63-64a; 130a-135a.)

11. Despite the Department's abrupt termination of patenting in 1961, it has otherwise continued to recognize the value of oil shale.[11] For example, it has

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[10] 12a-14a, 36a; cf. 52a. The legislative history, excerpted in Appendix A to this brief, clearly shows that Congress intended the patenting of pre-1920 oil shale claims to continue.

[11] The climate of the oil shale region is arid, vegetation is sparse, and the location remote from population centers. The lands have scant value for any purpose other than oil shale development. *See, e.g.*, 7a.

maintained in effect the 1916 classification of oil shale lands as valuable mineral lands. It has embarked on a prototype oil shale leasing program that has produced hundreds of millions of dollars in lease bids. (197a, n. 54.) It has steadfastly resisted efforts of the State of Utah to select oil shale land in lieu of school lands provisionally granted but not in fact available to the State, arguing in this Court that in consequence of the selections

> "The financial loss to the United States is very substantial . . . . If . . . the most valuable mineral . . . can be selected, the total predictable disparity must amount to several hundreds of millions of dollars."[12]

REASONS WHY THE PETITION FOR THE WRIT SHOULD BE DENIED

1. The decision of the Court of Appeals correctly held that Congressional action had incorporated into the Mining Law as applied to Green River Formation oil shale claims a determination as to value which it was beyond the power of the Department through administrative action thereafter to rescind with retroactive effect as to the six claims in suit. This is not only a case where Congress has specifically considered and approved a long-established and consistent administrative practice, although that is clearly true. It is also a case where the administrative practice had itself been anticipated by Congress and reflected a

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[12] Petition for Certiorari, *Andrus* v. *State of Utah*, No. 78-1522, pp. 10-11. Utah of course seeks the selected oil shale lands precisely because it agrees they are very valuable. Nonetheless, the State filed a brief amicus below in support of the Department, concerned that pre-1920 oil shale claims within the selected lands might be patented to private parties.

Congressional understanding, in the enactment of the Mineral Leasing Act of 1920, that the oil shale deposits of the Green River Formation that had been classified as valuable mineral lands in 1916 were indeed valuable and should be treated as such in administration of the public land laws. Congress understood that these deposits had very substantial values because of their capacity to provide large quantities of oil in the future; indeed, oil shale was too valuable to leave under the mining laws and was set aside, valid claims excepted, for leasing. Congress was also aware that the Department of the Interior had made a number of statements to Congressmen and to private individuals indicating that oil shale lands could be taken to patent under the placer mining laws.[13] As the Court of Appeals concluded, Congressional consideration of oil shale has constituted an "affirmative adoption of the very basic application of the mining laws to make it part of the statutory method of development of the oil shale reserves." (18a.) It is not obvious how one can reconcile Congress' plain understanding that pre-Leasing Act oil shale claims could be taken to patent, with the position now asserted by the Department that no oil shale deposits have ever been valuable or patentable. The enactment by Congress of the Mineral Leasing Act of 1920 and the almost contemporaneous publication of the Department's wholly consistent "*Instructions*", 47 L.D. 548 (May 10, 1920), show that from the very outset a recognition of oil shale deposits as constituting valuable mineral lands was an explicit central core in the administration of the Mining Law and the Mineral Leasing Act's savings clause with respect to oil shale.

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[13] *E.g.*, 5a, 34a; authorities cited p.7, n.5 *supra*.

The publicized inquiry in 1930-31 by Congress into the Department's administration of the law as to oil shale thus confirmed not only an administrative practice but the original Congressional intention. In that inquiry, because of Kelley's focus on the *Freeman* v. *Summers* decision, the very issue which the Department now seeks to relitigate was passed on by the investigators. Congress was specifically invited by Secretary Wilbur to consider whether the "question of discovery . . . will impress you as requiring legislative definition." (*1930-1931 House Hearings, supra*, p. 181.) The House investigation concluded with legislative proposals that contained no recommendation for change with respect to discovery. (35a-36a.) The charge for the Senate investigation was set forth in Senate Resolution 379, which had been proposed by Senator Walsh, and required an investigation of the

> "practices, rulings and actions of the Department . . . in relation to the preservation or disposition of such [oil shale] lands, or of applications for patent . . . and to make such recommendations as to it may seem appropriate touching needed legislation or other Governmental action for the recovery of any such lands . . . or for a review of any final award by the Secretary of the Interior of any such lands." (*1931 Senate Hearings*, pp. 1-2.)

Upon conclusion of the Senate hearings, Senator Nye, Chairman of the Committee, wrote to Secretary Wilbur that

> "Responding now to your letter of April 10, I have conferred with Senator Walsh and beg to advise you that there is no reason why your Department should not proceed to final disposition of the pending applications to oil shale lands in conformity to the law." (11a.)

The Department of the Interior, which had explained at length why it believed its practices were in conformity to the law but which had suspended issuance of oil shale patents pending Congressional investigations, promptly resumed processing of patent applications, and a large number of additional claims were patented over the next thirty years. As the courts below held, this is a clear case of Congressional consideration and approval of a well-established administrative application of a statute, with the effect of precluding subsequent contrary administrative interpretations. *E.g., Corn Products Refining Co.* v. *Commissioner,* 350 U.S. 46, 52-53 (1955); *Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294, 311-315 (1933).

Further compelling evidence of Congressional approval of the patentability of oil shale claims appears in the 1956 amendment of the mining laws enacted to facilitate the patenting of oil shale claims. The supporters of this legislation, in Congress and the Interior Department, pointed out that it would apply to pre-1920 oil shale claims only where discovery requirements had been satisfied. (*See* App. A hereto.) What the discovery requirements were was not the subject of extended consideration, undoubtedly because both the Congress and the Department regarded that as long since firmly settled. It is impossible, however, to reconcile Congress' action in 1956 with the view now endorsed by the Secretary that no oil shale claim has ever been patentable and that to regard an oil shale claim as patentable is "clearly contrary to the mining law". (Pet. p. 10.)

The Petition cites *TVA* v. *Hill,* 437 U.S. 153 (1978), and *SEC* v. *Sloan,* 436 U.S. 103 (1978), but these cases involve quite different situations in which this Court

concluded that it should not defy plain statutory language on the basis of subsequent evidence of approval by some within the Congress of a contrary interpretation of the statute.[14] In short, the decision below, grounded on affirmative Congressional approval of administrative practice consistently maintained for more than forty years and applied in thousands of applications of the public land laws, presents no federal question not already decided by this Court.

2. The decision below has limited precedential significance. Taken as a ruling on the question of Congressional ratification, the decision depends upon facts peculiar to the intensive scrutiny which the Department's administration of oil shale has received from Congress. Taken as a ruling having a bearing on the possibility that substantial acreage of oil shale claims will be patented, the Petition misconceives the facts. Far from the 5 million acres which the Petition suggests will go out the window if the decision below is permitted to stand, the acreage which will be patented as a consequence is much nearer the 960 acres embraced within the claims in suit. This is so because virtually all oil shale mining claims were declared invalid in the 1920's and 1930's for non-performance of assessment work[15] and for many other defects then

[14] In another oil shale case, however, the Solicitor General has recently argued with respect to an administrative interpretation of the Taylor Grazing Act that "Congress, having 'revisited the Act . . . left the practice untouched' indeed expressly endorsed it." *Andrus* v. *State of Utah*, No. 78-1522, Petition for Certiorari, p. 20. That petition also argues that a January 1974 letter to the Secretary from Senators Jackson and Metcalf constituted Congressional approval of the position the Department had taken in its dispute with the State of Utah over its "in lieu" school selections. (pp. 23-24.)

[15] See p.10, n.8, *supra*. *Hickel* v. *Oil Shale Corp.*, 400 U.S. 48, 57 (1970), held that Interior had had authority to invalidate

perceived.[16]. Before any of those claims could be patented, the owners would have to overcome those prior cancellations and any other defects that the Department might presently assert. If those objections are meritorious, only a handful at most of further oil shale claims would be patented.

Respondents do not, of course, deny that their six claims are valuable, and thus there is some proprietary interest at stake. But in terms of the overall interest of this nation and the enormous extent of the Green River Formation itself, that proprietary interest is a very small one. Furthermore, it is not apparent why it would be appropriate to advance the interest of the nation in retaining ownership of oil shale lands because of their value, by contending that they are not valuable.

3. The single issue tendered by the Petition will not be decisive of this long-pending litigation. The District Court, on cross-motions for summary judgment, gave judgment for the Respondents on four grounds, of which the question of Congressional ratification is but one. Thus, if the Petition were granted confined to the single question presented by it, a reversal of the decision below would be followed by a remand requiring further proceedings in a litigation which has already occupied 15 years. If the possibility that oil shale mining claims might go to patent is to

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claims where the work requirements had not been substantially satisfied.

[16] The 5 million acre figure is difficult to reconcile with the fact that only 349,000 acres were patented during the period 1920-1960. Moreover, of 768 oil shale claims patented between the 1935 *Virginia-Colorado* ruling and 1960, only 261 had not been declared invalid for nonperformance of annual work. *See Oil Shale Corp.* v. *Morton*, 370 F. Supp. 108, 118 (D. Colo. 1973).

be regarded as warranting issuance of the requested writ—and no other substantial ground for such action is suggested by the Petition—review in this Court should extend to the three alternative grounds for decision in their favor which the Respondents have advanced in the lower courts. Precisely the same amount of oil shale is at stake, and much more significant legal questions are involved.

a. The first such issue is whether, quite apart from Congressional intention and ratification, the oil shale deposits within the six claims at issue are valuable mineral deposits within the meaning of the mining laws, *i.e.*, whether there were reasonable prospects for developing a paying mine, including prospects of marketing products at a profit. Although the evidence bearing on this is very extensive, Respondents' position may be simply stated. It is uncontroverted that at the time the claims were located, the supply of oil was declining, the demand was increasing rapidly, the price was increasing even more rapidly, the basic technology to produce oil from oil shale was in existence, and projected production costs were significantly less than selling costs. (*E.g.*, 4a-5a; 41a-48a.) Moreover, the record contains contemporaneous cost studies by private parties, general pronouncements of economic feasibility by well-informed and highly placed government officials, and a detailed retrospective analysis of the economics of producing oil from oil shale in the years 1915-1920 prepared for this litigation by expert witnesses retained by Interior, all of which show that positive returns could have been expected. The record also contains cost studies around 1950 and 1966, on the eve of trial, that likewise show that operations would be profitable. (*E.g.*, 14a-15a; 38a, 46a, 97a-99a.)

Further evidence that oil shale is valuable appears from the conduct of other interested parties, including the Department of the Interior, which classified the lands as valuable mineral lands in 1916, urged inclusion of them within the Mineral Leasing Act of 1920 precisely to realize their value, and encouraged governmental and private research and development activities. The Department is presently engaged in a prototype oil shale leasing program that has produced many millions of dollars of revenue, and has for fifteen years been vigorously opposing efforts of the State of Utah to select oil shale lands in lieu of other mineral school lands on the ground that the selected oil shale lands provide the State a "highly profitable trade . . . an unconscionable" advantage. (*See* Petition for Certiorari, *Andrus* v. *State of Utah*, No. 78-1522, pp. 10, 21.)

Interior's response to all this is basically that oil shale was not profitable enough to have induced investment needed to establish a commercial industry. This is an argument that not only must there be reasonable prospects for developing a paying mine, the paying mine itself must appear. That view is in conflict with the test specified early in *Castle* v. *Womble*, 19 L.D. 455, 457 (1894), and endorsed by the courts, *Chrisman* v. *Miller*, 197 U.S. 313, 322 (1905); *United States* v. *Coleman*, 390 U.S. 599, 602 (1968).

b. The second such issue arises from the well-established doctrine that prohibits the retroactive reversal of a long maintained administrative rule or practice absent compelling reason, which is wholly absent (16a.). Interior's rule that oil shale was valuable was very carefully formulated over the years 1916-1920, and was officially promulgated in the 1920 *In-*

structions. It was thereafter applied for the next forty years in the determination that 2,326 oil shale claims had satisfied the discovery requirements of the mining laws. It was also applied in numerous administrative adjudications where mining claims had not been made the subject of patent applications. (E.g., 167a-170a.) The same rule was also consistently applied to deny homesteaders rights to oil shale.[17]

The impropriety of such a reversal, absent compelling reason, is demonstrated by numerous authorities. *E.g., Logan* v. *Davis,* 233 U.S. 613, 626-27 (1914); *Brimstone Railroad and Canal Co.* v. *United States,* 276 U.S. 104, 122 (1928); *United States* v. *Midwest Oil Co.,* 236 U.S. 459, 474, 481 (1915); *United States* v. *Leslie Salt Co.,* 350 U.S. 383, 396-97 (1956); *Saxbe* v. *Bustos,* 419 U.S. 65, 74 (1974). There is no compelling reason here. To the contrary, the Department is clearly motivated by recognition that oil shale is indeed valuable.

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[17] The Act of July 17, 1914, an exception to the usual pattern which prohibited homestead entry on mineral land, authorized the issuance of homestead patents for land containing valuable deposits of enumerated minerals (among them "oil"), provided that there was a reservation to the United States "of the deposits on account of which the lands were withdrawn or classified or reported as valuable . . ." 38 Stat. 509, 30 U.S.C. 121. Since 1916 the Department has consistently construed "oil" to include oil shale and has issued homestead patents under the 1914 Act for lands within the Green River Formation oil shale deposits only with a reservation of the oil shale to the United States. *See Brennan* v. *Udall,* 251 F.Supp. 12 (D. Colo. 1966), *aff'd.,* 379 F.2d 803 (10th Cir.), *cert. denied,* 389 U.S. 975 (1967). Inasmuch as the 1914 Act authorizes a reservation of oil shale only where the oil shale deposits were "valuable", the Department's position in the present litigation is at odds with the basis upon which 200,000 acres of oil shale deposits were reserved to the United States in Colorado and Utah.

c. The third such issue is whether the Department may now in fairness and equity be heard to assert that the oil shale of the Green River Formation has never been valuable or patentable. There is extensive evidence of conduct and public pronouncements by many Interior Department officials during the years 1916-1920, well within their statutory authority, designed to encourage private activity in locating and maintaining oil shale mining claims and in efforts to develop a commercial industry. (4a-5a, 42a-43a.) In addition, the Department of the Interior publicly and prominently recognized the patentability of oil shale claims for the next forty years, and further encouraged private efforts to develop a commercial industry. During that period, Respondents and many other persons made significant expenditures in efforts to acquire, maintain, and patent oil shale mining claims, and many persons in addition to Respondents have made similar expenditures for unpatented claims and for technological research and development. (45a-47a, 130a-135a, 145a-160a.) These circumstances, amply documented in the extensive administrative record (40a-41a), warrant a holding that the Department of the Interior is estopped to contend that no oil shale has ever been valuable and no oil shale claim has ever been patentable.

Over the past fifteen years or so, the lower courts have increasingly concluded that circumstances were appropriate for application of this doctrine against a government agency. *E.g., United States* v. *Wharton,* 514 F.2d 406, 412-413 (9th Cir. 1975); *Fox* v. *Morton* 505 F.2d 254, 256 (9th Cir. 1974); *Brandt* v. *Hickel,* 427 F.2d 53, 56-57 (9th Cir. 1970); *United States* v. *Georgia-Pacific Co.,* 421 F.2d 92 (9th Cir. 1970); *Chapman* v. *El Paso Natural Gas Co.,* 204 F.2d 46, 53-54

(D.C. Cir. 1953); Davis, *Administrative Law of the Seventies*, §17.01 (1976). Divergent approaches and differing qualifications are being taken with respect to what many years ago was sometimes regarded as a blanket government immunity from estoppel. This Court has not to our knowledge issued a ruling in this area during the period of change. The District Court's ruling in Respondents' favor on the estoppel issue (which the Court of Appeals did not reach) demonstrates convincingly that on the facts of this case the Department was properly held to be estopped.

CONCLUSION

For the reasons stated, the Petition should be denied. If, however, the Petition be granted, the grant should include the issues discussed in paragraph 3, pages 19–24 above.

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